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NO. .....

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

Geary Gilmore,

Petitioner

v

Theodore Koehler,

Respondent

ANSWER TO PETITION FOR WRIT OF CERTIORARI

Court of Appeals No. 82-1334

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Whether argument by the state prosecutor offended Petitioner's rights under the Federal Fourteenth Amendment.

II.

Whether admission of forensic evidence implicating Petitioner's co-defendant and trial court instruction thereon offended Petitioner's rights under the Federal Fourteenth Amendment.

III.

Whether counsel for Petitioner's co-defendant offended Petitioner's right to confrontation under the Federal Sixth Amendment.

IV.

Whether trial court admission of rebuttal evidence and prosecutorial argument thereon offended Petitioner's rights under the Federal Fourteenth Amendment.

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JURISDICTION OF THE COURT

Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts Petitioner's statement of constitutional provisions.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case.

STATEMENT OF PERTINENT FACTS

Respondent accepts the statement of facts offered by Petitioner. In addition Respondent states the following salient facts:

Petitioner was jury convicted in Wayne County, Michigan, Circuit Court of kidnapping and murdering Keith Arnold, age

six, and Gerald Kraft, age eight, following a bungled extortion plot. Petitioner was tried jointly with two co-defendants; Byron Smith and Jerome Holloway.

Prior to trial Petitioner requested severance. It was asserted that joint trial would preclude, on Fifth Amendment grounds, Petitioner from calling as defense witnesses his two co-defendants. Petitioner's motion was denied. The trial court noted that even if separate trials were held the remaining defendants could, and probably would, assert Fifth Amendment privilege.

During summation, counsel for co-defendant Holloway made the following comment:

> You remember when Peter betrayed Christ. After learning what he had done, he had gone into the crowd and trailing from afar off, he got into the crowd and said, "do you know him?". He said, "No, I don't know him". What did he do? He went away and wept bitterly. I don't know why on Easter Sunday morning, he came back. Go and tell my deciples (sic), and Peter, too: The same man who betrayed Christ. Why did he do that? Why did he ask for Peter? I believe this was because he wept. He remorse, not for what he had done, but what he had failed to do, to save the man who was a friend, and who had done nothing to him, because he had but, cut off that morning. He wept because he was unable to see within himself, I didn't do it, caught in the middle, if I do, we'll probably be killed but I did not do this, so he wept. Payne. I asked her if she was afraid of him then. She said, no. He was nervous, upset; I hurt my mother. He wept. Can you in good conscious on this record if you can, do your job!

Following defendant Holloway's summation, no objection or motion for severance was made. The comment was not addressed or responded to during summation by either counsel for Petitioner or defendant Byron Smith.

Among the witnesses called during the prosecutor's case in chief was Philip Arreola of the Detroit Police Department, Voice Print Identification Unit. The witness testified that his comparison of recorded telephonic ransom demands received by the families of Gerald Kraft and Keith Arnold, and voice recordings of defendant Jerome Holloway led him to conclude that Holloway had communicated the extortion calls. Petitioner made no objection to the testimony of witness Arreola.

Prior to playing the tapes compared by Arreola the trial court instructed the jury as follows:

> What we are going to have now, ladies and gentlemen of the Jury, is playing of the portion of the tape which was exhibit 8, a tape cassette of the callers at the home of the complainant. Then we are going to have a playing of the tape cassette, which is exhibit 33, which a known voice of the defendant Jerome Holloway. Two precautionary instructions to the jury, this being given to you for the sole purpose of your determining the experience of this witness, determining what he states, his technique and his background and his learning and what he used, the tools to make the comparison. You understand that you cannot assume the role of the expert in, and decide from that whose voice that is. In other words, you're only looking at this opinion and what he based his opinion on. You cannot decide it's not this defendant and someone else. Do you understand that it is not your role as jurors? You are only simply listening to determine whether or not this witness knows what he speaks. It is not the inten-

> tion of the People to have any probative value whatsoever as far as defendant Smith and Gilmore are concerned.

During final instructions to the jury the trial court stated:

> In some cases it is impossible by a description, however graphic, to explain technical or scientific matters or things so as to enable a person not trained in such matters, to comprehend or understand their special significance or application to issues before the court. In order to assist the jurors and the court to fully understand such matters, and to correctly apply them to the facts in issue, the testimony of certain witnesses has been received. When a scientific or expert witness testified you should treat it in the same manner as any other testimony in the case. The mere fact that it was offered by experts does not compel you to take their testimony in preference to any other, but you should give such testimony the same consideration, everything else being equal, as that of any other witness.

Petitioner raised no objection to either of the above instructions.

At trial Petitioner testified on his own behalf and suggested that another individual, Gary Braceful, had committed the crimes at issue. Braceful himself was found murdered the day after the bodies of Arnold and Kraft were discovered.

On rebuttal, the prosecutor introduced forensic evidence that Arnold, Kraft, and Braceful had all been murdered with the same weapon. The prosecutor discussed his rebuttal evidence during his initial summation:

> Defendant Gilmore went a step further, he not only said that he was elsewhere at the time and had nothing to do with this, but he has the propensity to hide behind dead

people. Only the two children can tell us was (sic), for sure, who killed them. They are dead. Only the children can tell us who got them from their apartment. We know who took them to their apartment, but who picked them up for sure (sic). The inference is that the three defendants did. But for sure, who did that? They are dead. They cannot tell us. The children could tell us who pulled that trigger on each of them. They are dead. Geary (sic) Braceful could tell us who brought those children into that apartment because the testimony from other witnesses was that he was there when the children were brought in. Gary Braceful could tell us what he knows about this, but he is dead. Mysteriously killed by the same weapon that shot those children. Johnny Stanley could tell us the reason Defendant Gilmore was at the apartment on Schaefer but she is dead. He thinks he went there to help her move. But I think the facts warrant the inference that he did not want to be around the 14th street apartment, so he went elsewhere. Johnny Stanley can't tell us that, because she is dead.

During final summation, the prosecutor made the following comments:

Now, the defendants attempt to explain away the death of Geary (sic) Braceful with the same gun by saying that, well, he must have been involved and was eliminated. Why weren't the other people who were involved or who witnessed what went on eliminated? Well, let's look at the testimony. There were three witnesses. The three of them who were summoned to the Schaefer Street apartment. Carol Payne, Denise James and Jackie Wesley. Perhaps they were not fool-hearted enough to say what they would tell. As a matter of fact they went the opposite way and told them they would not tell.

• • •

> Well, it is rather inconsistent with the defense position that Geary (sic) Braceful did it. Because if Geary (sic) Braceful did it, all they would have to do is say Geary (sic) Braceful did it. They would not have to lie. If Geary (sic) Braceful did it why are they not saying that Geary (sic) Braceful did it. Aren't they saying that Geary (sic) Braceful did it? They want to get off the hook. Off what hook? If we are to accept the defense position on one hand and that Geary (sic) Braceful did it then there is no hook for the other people to be on, is there? I am almost finished.

Petitioner lodged no trial court objection to any of the above prosecutorial comments.

REASONS FOR DENYING THE WRIT

I.

Direct state appellate review of Petitioner's assertion respecting improper prosecutorial comment was precluded by the absence of timely objection. *People* v *Gilmore*, 73 Mich App 463, 470-471; 252 NW2d 488 (1977). Similarly, the United States District Court concluded that under *Wainwright* v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977), the procedural default barred federal habeas corpus examination. *Gilmore* v *Koehler*, USDC-WN No. M78- 12CA2, April 28, 1982, p. 6.

The United States Court of Appeals conducted a thorough examination of Petitioner's misconduct allegations and concluded that none of the alleged errors offended the Federal Constitution. *Gilmore* v *Koehler*, USCA6, No. 82-1334, March 3, 1983, p. 2.

It is Respondent's view that under either of the above theories review in this forum is unwarranted.

II.

Petitioner argues that admission of forensic evidence (to wit: expert voice print testimony) and jury instructions thereon offended federal due process. The United States Court of Appeals examined Petitioner's claim and concluded:

> There was no error in the admission of the expert testimony; it is doubtful, moreover, that even if error had been committed in this regard that it adversely affected this appellant, particularly in light of the later precautionary instructions. The fact that the prosecution tied the caller, Holloway, to appellant, Gilmore, in respect to the kidnapping and the ultimate tragic outcome of the kidnapping is not any basis for appellant's claim that his constitutional rights were somehow prejudice by the proceedings involving identification of the voice of Holloway as the caller who was seeking extortion money or a kidnap ransom.
>
> *Geary Gilmore* v *Theodore Koehler*, USCA6 No. 82-1334, March 3, 1983, p. 3-4.

A similar conclusion was reached on direct state appeal and in the United States District Court. Respondent contends that re-examination in this tribunal is unnecessary.

III.

Regarding Petitioner's assertion that counsel for a co-defendant violated his confrontation rights the Michigan Court of Appeals stated:

> We do not even perceive how the remarks of defendant Holloway's counsel concerning Holloway's mental state,

> which counsel couched in biblical terms, could incriminate defendants Gilmore and Smith.
>
> *People* v *Gilmore, supra,* 73 Mich App at 469.

Similarly, the United States Court of Appeals found no merit in Petitioner's claim:

> These remarks do not constitute any charge, inference or statement that appellant was the criminal actor; they represent an attempt on Holloway's lawyer's part to explain a way the testimony of witnesses that could be deemed detrimental to his client. The trial judge acted within his sound discretion in denying Gilmore's motion for severance, and appellant failed to demonstrate that any actions complained about at trial had a substantial or unfairly prejudicial affect upon him simply because he was on a trial with co-defendants Smith and Holloway.
>
> *Geary Gilmore* v *Theodore Koehler,* USCA6 Case No. 82-1334, March 3, 1983, p. 4-5.

It is Respondent's view that the above holdings are dispositive of Petitioner's assertion. Additional examination of this issue is unnecessary.

IV.

Petitioner's allegations respecting rebuttal evidence and subsequent argument thereon by the prosecution do not merit examination by this court. The offered evidence has been examined on direct and collateral review and found to be appropriate rebuttal. *People* v *Gilmore, supra,* 73 Mich App at 469. *Geary Gilmore* v *Theodore Koehler,* USCA6 No. 82-1334, March 3, 1983, p. 2. Similarly, the prosecutor's comments on rebuttal have been so examined and found to be proper argu-

ment on testimony offered during trial. *People* v *Gilmore, supra,* at 470; *Geary Gilmore* v *Theodore Koehler,* USCA6 No. 82-1334, March 3, 1983, p. 2.

RELIEF

WHEREFORE, for the foregoing reasons, Respondent respectfully requests this Honorable Court deny Petitioner's application for writ of certiorari.

Respectfully submitted,

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